

FREDERICK SABATTIS, BRIAN SABATTIS, MARGARET POLCHIES and ROSE ATWIN (Plaintiffs) V. OROMOCTO INDIAN BAND, represented by its CHIEF, EMMANUEL POLCHIES and COUNCILLORS, MARK SABATTIS and JOHN SACOBIE (Defendant) and STEVEN G. SACOBIE, CLIFFORD SACOBIE, LABELLE SAULIS and WILLIAM SACOBIE (Party by Intervention) and ATTORNEY GENERAL of CANADA (Party by Intervention)

[Indexed as: **Sabattis, Polchies and Atwin et al. V. Oromocto Indian Band, Sacobie and Saulis et al.**]

New Brunswick Court of Queen's Bench, Trial Division, Russell J., January 22, 1988

D. Stevenson and C. Layden-Stevenson, for the plaintiffs
G. McAllister, for the defendant
G. Pugh, for party by intervention
J. Townsend, for the Attorney General of Canada

The plaintiffs, former members of the Oromocto Indian Band, brought an action claiming they were entitled to share in the proceeds of a land claims settlement entered into between the federal government and the band in 1983, respecting lands taken by the federal government in 1953. Pursuant to a band council resolution distribution was based on a May 25, 1983, band list.

The Court of Queen's Bench, Trial Division ([1986] 1 C.N.L.R. 145) held that it lacked jurisdiction as the matter was within the exclusive jurisdiction of the Federal Court. The court held that the powers conferred on the band by the *Indian Act*, R.S.C. 1970, c.I-6 brought it within the definition of "federal board, commission or other tribunal" in s.2 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10 and that the plaintiffs' claim was in the nature of declaratory relief within s.18 of the *Federal Court Act*. The plaintiffs appealed and the band cross-appealed on the issue of costs.

The Court of Appeal ([1987] 3 C.N.L.R. 99) allowed the appeal and dismissed the cross appeal. The court held that the band was not a federal board, commission or other tribunal and that the action was properly brought in the Court of Queen's Bench.

In the following decision the Court of Queen's Bench determined the action on its merits.

Held: Plaintiffs' action dismissed.

1. The plaintiffs' claim relates in one manner or another to the expropriated land, thus bringing s.16(2) of the *Indian Act* into play. Section 16(2) provides that a person leaving one band and becoming a member of another band is not entitled to any interest in the lands or monies held by the Crown on behalf of the former band. Section 16(2) provides an element of certainty so that individuals can determine their rights and obligations to their present bands and prospective bands before deciding whether to move or transfer. Therefore because the plaintiffs were not on the May 25, 1983 band list they were barred from sharing in the settlement monies.
2. The fact that the plaintiffs were members of the band before, on or after 1953 does not give rise to a right to share in the proceeds of settlement. There was no proprietary interest to the surrendered lands in the members of the band in 1953 and therefore the members did not, in 1953, have a right to a per capita share of the settlement monies. The decision of the band to divide the monies among individuals selected as of a fixed date does not create title in individuals prior to the passing of the band council resolution in 1983.

* * * * *

RUSSELL J.: The plaintiffs claim they are entitled to certain monies received by the defendant as a result of a land settlement agreement made between the defendant and the Government of Canada.

This action has had a circuitous path through the courts and a jurisdictional question which impeded its progress was decided by the Court of Appeal of New Brunswick in November 1986. [See 76 N.B.R.(2d) 227, 192 A.P.R. 227, [1987] 3 C.N.L.R. 99]. In that judgment Chief Justice Stratton outlined the facts as follows [p.100 C.N.L.R.]:

On July 13, 1983 the Oromocto Indian Band, as represented by its chief and councillors, entered into a land claim settlement agreement with Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development. It was a term of the settlement that the Minister would pay to the band the sum of \$2,550,000.00 in respect of the surrender of 72.5 acres of land in Oromocto Indian Reserve No.26, Sunbury County, N.B. The lands in question have been surrendered to the federal Crown and the net settlement funds have been deposited to the band's bank accounts.

On the same day that the deposits were made to the band's bank account, the band council passed the following resolution:

Be it resolved that the Department of Indian Affairs transfer from the Band's Capital Account \$500,000.00 and from the Band's Revenue Account 1.5 million dollars into the Oromocto Indian Nation Land Claim Account at the Toronto-Dominion Bank, Oromocto, New Brunswick, Account #735201 for the purpose of a per capita distribution to the Band members whose eligibility was determined by the official Band Membership list updated as of May 25, 1983 and for payment of all expenses related to the establishment and negotiation of the claim; authority of such distribution being established at a Band Meeting of April 5, 1983 and confirmed by this resolution.

Earlier, on June 2, 1983 the appellants commenced the present action against the band as represented by its chief, Emmanuel Polchies and its councillors, Mark Sabattis and John Sacobie. . . . In the action, the appellants claim that as former members of the band, or as direct descendants or next of kin of former members, they are entitled to share in the settlement proceeds. Subsequently, certain members of the Kingsclear Indian Band and the Attorney General of Canada were added as intervening parties in the litigation. It should also be noted that with the consent of the parties a judge of the Court of Queen's Bench ordered that the sum of \$370,000.00 representing approximately 15 percent of the settlement funds, not be disbursed pending the outcome of the present action. The appellants seek a declaration that they are entitled to the retained funds and an order for the payment of them to them.

By way of further explanation, it is undisputed the federal government expropriated approximately 72.5 acres of the Oromocto Reserve's lands in 1953 during the construction of Camp (now Canadian Forces Base) Gagetown. The Band was paid \$3,400.00 at that time and in 1982 negotiations were reopened between the Oromocto Band and the federal government for a further sum of money, with those negotiations resulting in the 1983 settlement. Sometime before this action's commencement the plaintiffs moved from the Oromocto Reserve to the Kingsclear Reserve and their names were deleted from the Oromocto Band List and added to the Kingsclear Band List. The exact identity of those people the plaintiffs say are entitled to share in the proceeds of the 1983 settlement is contained in the notice to admit facts.

Subsequent to the receipt of the 1982 settlement funds and based on the previously mentioned band council resolution \$1,699,500.00 was distributed to 169 members of the Oromocto Indian Band on the following basis:

The full particulars of the settlement, holdback and per capita distribution are as follows:

Capital Account	\$1,000,000.00
Revenue Account	\$1,550,000.00
TOTAL	\$2,550,000.00
Less withheld upon commencement of instant proceedings 2,550,000.00)	\$382,500.00
SUBTOTAL	\$2,167,500.00
less loan repayment	\$ 43,000.00
SUBTOTAL	\$2,124,500.00
less capital unavailable for distribution pursuant	

to s.64(1)(a) (\$1,000,000.00
less 15% = \$850,000.00 + 2)

AVAILABLE FOR PER
CAPITA DISTRIBUTION

\$1,699,500.00

DIVIDED BY 169
MEMBERS

\$10,056.21 per Band
Member

The number of band members was determined from the May 25, 1983 Band List (Exhibit D-4) and that this list was to provide the basis for the distribution was established by a band council resolution of July 13, 1983 (Exhibit D-6) as follows:

Be it resolved that the Department of Indian Affairs transfer from the Band's Capital Account \$500,000.00 and from the Band's Revenue Account 1.5 million dollars into the Oromocto Indian Nation Land Claim Account at the Toronto-Dominion Bank, Oromocto, New Brunswick, Account #735201 for the purpose of a per capita distribution to the Band members whose eligibility was determined by the official Band Membership List updated as of May 25, 1983 and for payment of all expenses related to the establishment and negotiation of the claim; authority of such distribution being established at a Band Meeting of April 5, 1983 and confirmed by this resolution.

The plaintiffs are faced with s.16(2) of the *Indian Act*, R.S.C. 1970, c.1-6, and amendments. Sections 16(1) and 16(3) were repealed by S.C. 1985, c.27, ss.6(1) and 6(2) respectively. Section 16(2) says:

(2) A person who ceases to be a member of one band by reason of his becoming a member of another band is not entitled to any interest in the lands or monies held by Her Majesty on behalf of the former band, but he is entitled to the same interest in common in lands and monies held by Her Majesty on behalf of the latter band as other members of that band.

In constructing their argument the plaintiffs say the land was unconditionally surrendered in 1953 and the monies received in 1983 were not monies "held by Her Majesty on behalf of the former band," because negotiations between the government and the Band resulting in the 1983 settlement did not even commence until 1982. There was not any exchange of money even contemplated until 1982. The plaintiffs say the 1983 agreement constitutes the conclusion of the 1953 surrender, although the lands in question were not reserve lands in 1983. Because negotiations were not commenced until 1982 and because the lands had been disposed of in 1953 the 1983 settlement monies were not "monies held by Her Majesty on behalf of the former band." Thus, say the plaintiffs, the *Indian Act* has no application.

The next step in the plaintiffs' reasoning is that because they were members of the defendant Band prior to, on, or subsequent to 1953 they "are entitled to share in the proceeds paid with respect to the surrender of the reserve lands in question, notwithstanding that the payment occurred 30 years subsequent to the surrender." See: plaintiffs' pretrial brief, paragraph 23. The plaintiffs go on to argue that to deny the plaintiffs a portion of the settlement proceeds would be an unjust enrichment of the defendant members.

They then argue the defendant is chargeable as a constructive trustee to protect the plaintiffs' funds.

The Attorney General of Canada relies essentially on the provisions of the *Indian Act* to defeat the plaintiffs' claims. The defendant relies on the *Indian Act* as well, specifically s.16, but further raises an elaborate and lengthy constitutional argument based on the inapplicability of the doctrine of constructive trust to this situation because of the paramountcy doctrine.

I should say at the outset that I do not find it necessary to deal with the last mentioned position.

In their 24th of November 1983 pretrial brief prepared prior to the jurisdictional question being raised, the plaintiffs' position is that the *Indian Act* taken as a whole was supportive of and formed the foundation for the plaintiffs' claim. Paragraph 7 of that brief said:

It is accordingly submitted that section 16, when taken as a whole, deals with the retention of rights by Indian band members. The legislative intent expressed in the section appears to

be one of ensuring that band members are not penalized simply because they move from one band to another.

Now, the plaintiffs say the *Indian Act* is not applicable. In their current brief the plaintiffs say: "The plaintiffs submit that the Act does not apply to the plaintiffs claim." See paragraph 14, plaintiffs' pretrial brief, 28 August 1987.

Certainly positions often become more refined in complex situations as time passes and familiarity increases. However, to take two diametrically opposed positions in support of the same claim at different times is somewhat unusual.

In any event, regardless of the arguments, I have concluded that s.16(2) of the *Indian Act* is determinative of the matter.

It is not a question that one method to determine a band list is more just than another; rather there must be a degree of certainty. This is necessary so that individuals can determine their rights and obligations in relation to their present bands and prospective bands before deciding whether to move or transfer. Section 16(2) provides this element of certainty, and while the present type of situation may not have been contemplated by the drafters of the section it is nevertheless applicable.

The plaintiffs say that Her Majesty was not holding any lands or monies on behalf of the former (Oromocto) band and therefore s.16(2) is inapplicable; this because the land was already surrendered and because a further settlement was not even contemplated until the 1980s.

In so saying, the plaintiffs skirt the fact that their claim relates in one manner or another to the expropriated land. In order for there to be an unjust enrichment as argued by the plaintiffs the defendant or somebody had to improperly hold money or land that belonged to the plaintiffs. In one form or another the matter works itself back to the 1953 land expropriation and settlement, thus bringing the terms of the *Indian Act* into play.

As well, because the band council decided to disburse the monies to its members based on a May 25, 1983, membership list does not trigger any rights in the plaintiffs. The Oromocto Band might well have elected to allow the intervenor to hold the funds in the capital account and revenue account for twenty years, then disburse it in some other fashion.

Had the Oromocto Band chosen they could have, in 1953, elected to use the money for purchase of additional lands or for any other approved purpose designated at the time of receipt by a band council resolution. There was not any proprietary interest to the surrendered lands in the members of the Band in 1953 and therefore the members did not, in that year, have a right to a per capita share of the settlement monies. The Band in 1983 chose to make a per capita distribution to the people based on the May 25, 1983, Band List but they might just as well have chosen some other reasonable method of distribution.

The basis of the plaintiffs' argument is that they were members of the Oromocto Band before, on or after 1953, and for that reason have some interest in a share of the money. That is not necessarily so, however, because the land and whatever flows from it, whether by way of surrender or resurrender, is for the use and benefit of the Oromocto Indian Band and not any one individual. Because the Band chose to divide it among individuals selected as of a fixed date rather than, for example, constructing a recreation building does not create title in individuals prior to the passing of the July 1983 band council resolution.

The plaintiffs' action is therefore dismissed and the order of Mr. Justice Dickson of October 14, 1983, is vacated. The funds withheld by that order will be made available for appropriate distribution.

The defendant will have costs against the plaintiffs in the total amount of \$7,250.00 based on the amount withheld of \$382,500.00 and using Scale 1 of Tariff A, as well as provable disbursements. The parties by intervention are not entitled to costs.